

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOHN F. REPPARD

CASE NO. 89-00371

Debtor

IN RE:

J & S COUNTRY STORE, INC.

CASE NO. 89-00372

Debtor

APPEARANCES:

CAROLYN J. COOLEY, ESQ.

Trustee

405 Mayro Building

Utica, New York 13501

DURR & RILEY, ESQS.

Attorneys for Debtors

322 Post Street

P.O. Box 148

Boonville, New York 13309

WILLIAM J. RILEY, ESQ.

Of Counsel

ROBERT ABRAMS, ESQ.

Attorney General of the State
of New York

207 Genesee Street

Utica, New York 13501

ELIS J. DeLIA, ESQ.

District Tax Attorney and

Appraiser

Of Counsel

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Objections to Priority Claim of New York Department of Taxation and Finance ("Objections") filed by the Trustee in both of these related cases.

Both Objections appeared on the Court's motion calendar at Utica, New York on

January 15, 1991 and were adjourned at the request of the New York State Department of Taxation & Finance ("NYS Tax") to the motion term held at Utica on January 29, 1991. Following argument on that date, the parties were given until February 15, 1991 to submit memoranda of law.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of these contested matters pursuant to 28 U.S.C. §1334(b) and §157(a) (b)(1) and (b)(2)(B).

FACTS

On March 7, 1989 J & S Country Store, Inc. ("J & S") and John F. Reppard ("Reppard"), the sole officer and fifty per cent stockholder of J & S, filed voluntary petitions for relief pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §101-1330) ("Code").

NYS Tax was listed as a priority creditor in Schedule A-1 filed by the respective Debtors in each case, however, the matrixes prepared and filed by J & S and Reppard in accordance with the Local Bankruptcy Rules of this Court, and which are utilized by the Clerk of the Court to provide required notices to creditors, omitted NYS Tax.

Both Chapter 7 cases were initially classified as "no asset" cases in accordance with Rule 2002(e) of the Federal Bankruptcy Rules ("Bankr.R."), however, the Trustee thereafter and on or about April 24, 1989, notified the Clerk that there would be assets in each case.

On June 2, 1989, the Clerk, acting pursuant to Bankr.R. 3002(c)(5) and utilizing the aforementioned mailing matrixes provided by Debtors, gave notice to creditors that the last day to

file a proof of claim was August 23, 1989 ("bar date"). There appears to be no dispute that NYS Tax never received the June 2, 1989 notice and did not file a proof of claim on or before the bar date.

On October 4, 1990, NYS Tax did file a priority proof of claim in the J & S case in the sum of \$28,172.97 and on the same date filed a priority proof of claim in the Reppard case in the sum of \$27,089.62.

There does not appear to be any dispute that the proofs of claim filed by NYS Tax on October 4, 1990 resulted from correspondence sent to it by counsel for both Debtors dated September 10, 1990 advising NYS Tax of the bankruptcy filings. There is no proof that NYS Tax had any actual or constructive notice of either Chapter 7 case prior to September 10, 1990.

ARGUMENTS

The Trustee, noting that she holds funds in the Reppard case of approximately \$17,500 and funds in the J & S case of approximately \$15,500, contends that while she does not dispute the claims filed by NYS Tax, she opposes granting them priority status over the claims of other non-priority creditors who timely filed their claims.

NYS Tax simply argues that it never received notice of the Chapter 7 cases or the bar dates fixed therein and cannot be prejudiced by a lack of notice. In the alternative, NYS Tax asks that its claims be treated in accordance with Code §726(a)(2)(c).

The Debtors, particularly Reppard, join with NYS Tax in contending that the late filed claims should be allowed in the absence of notice of the bar date.

DISCUSSION

Bankr.R. 3002(c) requires that a creditor of a debtor who has filed a petition pursuant to Chapter 7 of the Code must file a proof of claim within ninety (90) days after the first date set for the meeting of creditors called pursuant to Code §341(a).

Bankr.R. 2002(a)(1) requires the Clerk to provide all creditors of a debtor with not less than twenty (20) days notice of the meeting of creditors pursuant to §341 of the Code.

There appears to be no dispute here that the NYS Tax was omitted from the mailing matrixes filed by both Debtors and, therefore, was unaware of the Chapter 7 cases until September 10, 1990 at the earliest, approximately one year after the bar date fixed by this Court had expired. Further, it appears, without dispute, that the claims of NYS Tax are entitled to priority pursuant to Code §507(a)(7).

The Sixth Circuit Court of Appeals recently visited a very similar factual setting in U.S. v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (6th Cir. 1990). In that case, the Chapter 7 debtor failed to list the Internal Revenue Service ("IRS") as a creditor and the IRS failed to receive notice of the Code §341 meeting scheduled for December 19, 1983, together with the notice of the last day to file claims. The IRS later learned of the Chapter 7 case on September 27, 1985 and filed a priority claim for pre-petition taxes on October 7, 1985.

The bankruptcy court, considering Bankr.R. 3002(c), 9006(b)(3) and Code §726(a)(2)(C), held that the IRS' claim could be paid only in accordance with Code §726(a)(3), that is, after payment of non-priority unsecured claims, as is urged by the Trustee herein. The district court then affirmed the bankruptcy court concluding that Code §726(a)(2)(C) does not apply to priority claims.

The Sixth Circuit, after assuring itself that the IRS claim was entitled to priority under Code §507 and while acknowledging that the United States is not entitled to due process of

law, observed that to exclude the IRS' claim under the facts of the case would result in all Code §507 priority claims, including those held by private parties, being excluded from allowance under Code §726 "thereby implicating due process rights". Id. at 1090.

Continuing, the Circuit Court concluded that "the basic principle of justice that notice and an opportunity to be heard are necessary before a party's claim is barred, applies to the present case as well". Id. at 1090. The Court cited the Tenth Circuit's language in Sheftelman v. Standard Metals Corp., 839 F.2d 1383, 1386 (10th Cir. 1987) that "Notice must be given to 'all creditors' under Rule 2002(a) of the time set for filing proofs of claim. The term 'all creditors' has no qualifications or limitations. This notice must also be given to satisfy due process requirements."

The Circuit Court then examined Code §726(a)(1) and concluded that Congress did not intend to make a distinction within the category of priority claims as to those timely filed and those tardily filed for whatever reason, as it had done with regard to tardily filed non-priority unsecured claims in Code §726(a)(2)(C). Cardinal Mine, 916 F.2d at 1091.

After examining the legislative history of Code §726(a)(2)(C), the Court in Cardinal Mine, supra, concluded

It would be inconsistent with such [legislative history] to exclude Section 507 claims that are untimely filed from Section 726. Not only is there no apparent rationale for excluding such claims, it is also unlikely that the legislature would have intentionally excluded such claims without discussing the reason for doing so. Whereas here, the reason for late filing of a priority claim is the failure to give the creditor notice, it should be treated the same as timely filed priority claims entitled to distribution under Section 726(a).

Id. at 1092.

The Trustee herein argues, as indicated, that NYS Tax should not be permitted to file its claim more than a year after the bar date and then claim priority status to the obvious detriment of general unsecured creditors who filed their claims timely. The Trustee also contends that NYS

Tax failed to move for an extension of time to file a proof of claim pursuant to Bankr.R. 3002(c) and that the Debtor failed to file a proof of claim on behalf of NYS Tax pursuant to Bankr.R. 3004.

It does not appear to this Court that either of the arguments based on Bankr.R. 3002(c) or 3004 are applicable in light of the admitted failure of NYS Tax to receive notice of the claims bar date.

Finally, the Trustee, in reliance upon a bankruptcy court decision in In re Penna, 46 B.R. 527 (Bankr. S.D.Fla. 1985), suggests that a failure by NYS Tax to provide notice to all creditors of a motion to file a late claim is a procedural error which should result in the granting of the Trustee's Objection.

The Court simply points out that a motion for permission to file a late claim is inapplicable where the claimant never received notice of the bankruptcy case. See In re Penna, 46 B.R. at 528. Additionally, the Court rejects the notion that creditors have been prejudiced by a lack of notice when it is the Chapter 7 Trustee who is here objecting to the claim of NYS Tax on the creditors' behalf.

Thus, the Court, following the rationale of the Sixth Circuit Court of Appeals in U.S. v. Cardinal Mine Supply, Inc., supra, denies the Objection of the Trustee and directs that the claim of NYS Tax be treated in accordance with Code §726(a)(1).

IT IS SO ORDERED.

Dated at Utica, New York
this day of May, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge